

Subsequent Efforts to Strengthen the Convention

The commitment of thirty-four countries to criminalize bribery of foreign public officials represents an important step forward in the fight against corruption in international business transactions. The Convention, however, does not explicitly address a number of other corrupt practices. Of particular concern to the United States are bribes to foreign political parties, party officials, and candidates for public office. These are not covered by the Convention although they are covered by the Foreign Corrupt Practices Act of 1977 (FCPA). The question of whether the obligations of the Convention should be extended to include an explicit prohibition of payments to immediate family members of foreign public officials and private sector bribery is also of interest to the United States.

During the negotiation of the Convention, the United States had sought to include a broader coverage of bribery in the agreement, similar to the coverage in the FCPA. Although the United States did not succeed in that effort, signatories to the Convention did agree that a number of issues related to coverage should be studied further. In all, five issues relating to corruption and the Convention were identified at the December 1997 OECD Council meeting for additional examination: bribery acts in relation to foreign political parties, advantages promised or given to any person in anticipation of that person becoming a foreign public official, bribery of foreign pub-

lic officials as a predicate offense for money laundering legislation, the role of foreign subsidiaries in bribery transactions, and the role of offshore centers in bribery transactions.

Initial discussion of the five issues occurred at an informal experts meeting in Milan October 5–6, 1998. Signatories had further discussions at meetings of the Working Group on Bribery in November 1998 and February and April 1999. At all of these sessions, the United States gave particular attention to coverage of foreign political parties, party officials, and candidates for political office because of concern that bribery of these individuals could lead to circumvention of the Convention and seriously undermine efforts to reduce corruption in international business transactions. The U.S. delegation encouraged Working Group members to examine these issues carefully and highlighted the importance of adequate coverage for making the Convention an effective tool to fight corruption.

At this point, no consensus has emerged on the need to expand coverage of the Convention. Rather, most countries are of the view that signatories should implement the Convention as it is and monitor implementation over time to see whether changes are necessary. At the May 1999 OECD ministerial meeting, ministers endorsed further consideration of the five issues as part of the OECD's work to strengthen the fight against corruption. In light of the

lack of consensus on expanding coverage, the United States has concentrated its efforts on encouraging all signatories to complete ratification and implementation of the existing Convention, while insisting that the outstanding issues remain on the Working Group's agenda.

The Five Outstanding Issues

Political Parties, Party Officials, and Candidates

During the negotiation of the Convention, the United States sought to include bribes paid to political parties, political party officials, and candidates for political office. These important channels of bribery and corruption are covered in the FCPA. They are not, however, specifically covered in the Convention.

The United States has argued in the Working Group deliberations that the serious concerns that led the signatories to combat bribery of foreign public officials apply equally to bribes offered or paid to political parties, party officials, and candidates for office. (See Appendix D, U.S. Response to Questionnaire on Four Issues, and Appendix E, U.S. Delegation Submission on Bribery of Foreign Political Parties, Party Officials, and Candidates for Political Office in International Business Transactions.) In addition to efforts within the OECD, the United States has raised these issues in other forums in order to ensure that awareness of their importance remains high. For example, Commerce Secretary William Daley, Under Secretary for International Trade David Aaron, Treasury Secretary Robert Rubin, and Under Secretary of State Stuart Eizenstat have noted U.S. concerns in meetings with their foreign counterparts on numerous occasions since the conclusion of negotiations on the Convention in November 1997. Andrew J. Pincus, General Counsel of the Department of Commerce, addressed these issues in his remarks at the Vice President's Conference on Corruption on February 25, 1999.

Bribery as a Predicate Offense to Money Laundering Legislation

With regard to the relationship between bribery and money laundering legislation, Article 7 of the Convention requires a party that has made bribery of its own public official a predicate offense for applying its money laundering legislation to do so on the same terms for the bribery of a foreign public official. A potential problem arises in that there could be uneven application of the Convention between parties that make bribery a predicate offense for money laundering legislation and those that do not.

Many signatory countries, particularly the European and civil law countries, define money laundering as the concealment of proceeds from all "serious crimes," as that term is defined under their domestic legislation. Others, like the United States, define predicate crimes in domestic legislation by cross-referencing a list of other specific offenses or statutory provisions.

How jurisdictions define "serious" cannot be generalized. Instead, definitions are based on individual domestic legal systems in each country (i.e., punishable by imprisonment of X period of time or, roughly, the distinction between a misdemeanor and a felony.) Thus, if all parties to the Convention would make bribery a serious offense for the purposes of domestic money laundering legislation, there would seem to be no need for going beyond the requirements in Article 7 of the Convention. However, it is clear that some parties to the Convention are reluctant to take this step.

The Role of Foreign Subsidiaries

Concerning the role of foreign subsidiaries in bribery transactions, the Convention would cover cases in which a company headquarters in a party state authorized a bribe. Use of the nationality basis of jurisdiction would also allow the Convention to be applied to cases where a party's nationals were involved in a bribery transaction. The effective supervision of foreign subsidiaries with regard to bribery in international business transactions is an issue that merits continued attention. The United States has urged further examination of strong standards of corporate governance, business ethics, and international accounting standards.

The Role of Offshore Financial Centers

On the role of offshore financial centers, there appears to be broad agreement on the need to encourage adherence to internationally recognized minimum standards in the areas of anti-money laundering, financial regulation, company law, and mutual legal assistance. These issues are not exclusive to offshore centers, nor are they restricted to the fight against bribery and corruption. Compliance with international norms is a focal point of the Financial Stability Forum's Working Group on Offshore Financial Centers, while the Financial Action Task Force's Ad Hoc Group on Noncooperative Countries and Jurisdictions is concentrating on compliance with international anti-money laundering practices. Other international forums with initiatives on related issues are the United Nations, the European Union, the Council of Europe, and the G-8. Bribery transactions frequently are carried out, at least in part, in jurisdictions

that do not participate in arrangements for international cooperation. This greatly complicates multilateral efforts to promote transparency in financial and commercial transactions and greater mutual legal assistance.

Other Issues Relating to Coverage

Immediate Family Members of Foreign Public Officials

Another issue of interest to the United States is the extent to which the Convention applies—or may be amended to apply—to bribes paid to immediate family members of foreign public officials. The U.S. Delegation has informally raised the question of whether the Convention provides adequate coverage of this issue. There is general agreement that bribes paid to a government official through a family member—either at the direction of a corrupt foreign official or where there is an understanding that the family member will pay some or all of the bribe to the official—is adequately covered by the Convention. Since all bribes paid to officials through intermediaries are covered, we have found no support for expanding the Convention to provide for an explicit prohibition against bribes paid to family members in the absence of the direction of a government official or absent the intent or expectation of the bribe payor that all or a part of the bribe will be paid to a government official. Indeed, we do not provide in our FCPA for coverage of payments to family members in such cases.

In the ongoing process within the OECD of reviewing the implementing legislation of each Convention party, we will continue to examine whether bribes paid to family members may provide a loophole of sufficient magnitude so as to undermine effective implementation of the Convention.

Private Sector Corruption

The issues of private sector corruption and corruption of officials for purposes other than to obtain or retain business are broad questions which have been raised on occasion by the private sector and noted in OECD Council statements. However, these issues go beyond the scope of the Convention. As the United States gains experience with the Convention, we will consider how private sector corruption and corruption of officials for purposes other than to obtain or retain business can be best addressed. The OECD Working Group has placed the subject of private sector bribery on its agenda for a preliminary discussion at its session July 7–9, 1999.

Conclusion

During the monitoring of the implementation and enforcement of the Convention, we will continue to raise these issues with other Working Group members. We also intend to work closely with the private sector and non-governmental organizations to convince the other parties to the Convention that additional prohibitions on bribe offers and payments will strengthen the Convention and advance our common goal of eliminating bribery in international business transactions.